

Issued August 22, 1913.

# United States Department of Agriculture,

OFFICE OF THE SECRETARY.

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## NOTICE OF JUDGMENT NO. 2511.

(Given pursuant to section 4 of the Food and Drugs Act.)

SUPPLEMENT TO NOTICE OF JUDGMENT NO. 1891.

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**United States v. J. L. Stephens Co. Judgment of lower court affirmed by  
the Circuit Court of Appeals for the Sixth Circuit.**

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### MISBRANDING OF A DRUG HABIT CURE.

On February 1, 1912, the Dr. J. L. Stephens Co. sued out a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit to set aside a judgment rendered and sentence pronounced upon an information charging said defendants with the shipment of two consignments of drug habit cure from the State of Ohio into the District of Columbia which were misbranded in violation of the Food and Drugs Act.

On March 13, 1913, proceedings on the writ of error having come on for hearing, judgment was affirmed by said Court of Appeals, as will more fully appear from the following decision rendered by the court (Warrington and Denison, Circuit Judges, and Cochran, District Judge):

PER CURIAM. This is a proceeding on writ of error to set aside a judgment rendered and sentence pronounced upon an information. The information contained two counts, and was based on the Pure Food and Drugs Act of June 30, 1906. The plaintiff in error, hereafter called defendant, is an Ohio corporation doing business and having its principal office at Lebanon, Ohio. It there maintains a sanatorium, where persons addicted to the drug and liquor habits are treated; and patients are also treated away from the institution through correspondence. According to an agreed statement of facts, the defendant shipped two boxes of medicine by railway from Lebanon, Ohio, to Washington, D. C.; one shipment was made December 19, 1908, and the other, October 22, 1909; each box contained 18 bottles of the medicine, and all the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were labeled "Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a

tablespoon four times a day and as directed." The President of defendant, who was also its Medical Director, has charge of the patients at the Sanatorium, and also of those who are treated at a distance through correspondence. He is a graduate of Columbia University, New York City, and has had a long and varied experience; indeed, he is a specialist in the treatment of patients addicted to drug and liquor habits. In the agreed statement of facts this appears:

"It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment."

This agreed fact is offered as a defense to the charge that the medicine in question was mislabeled and misbranded, because correct labeling and branding would defeat the object of the treatment. The defendant has no proprietary medicines and does not offer or sell any medicines to the general public. In every case where a patient applies for treatment, either at the Sanatorium, or at the patient's home, a history of the case is obtained from the patient, a diagnosis in each instance is made, and a prescription prepared by the Medical Director to meet the needs of the particular case.

The cause was submitted upon the agreed statement of facts alluded to, and each party asked for a directed verdict. The case was fully considered by the trial judge, who directed a verdict in favor of the Government and sentenced the defendant to a fine of \$50 and costs of prosecution. Among the questions determined was, whether it was necessary to allege that the two boxes or packages containing the bottles of medicine were misbranded, the information having simply charged that each of the bottles contained in such packages was misbranded. The court held that the word "package," as used in the act, "means the package which passes into the possession of the public, of the real consumer; and that the words, 'original unbroken package,' relate \* \* \* to the package in the form in which it is received by the vendee or consignee."

Another question determined was:

"\* \* \* whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce."

Upon this question the court held:

"As was said in the *Hipolite Egg Company* case (220 U. S. 45), the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the Act."

Still another question was determined:

"Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the state and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package enclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of the drug?"

We do not find it necessary to pass upon the last question stated. The Medical Director did not in his individual capacity prescribe or furnish the medicine for the persons served in this case. His acts were performed for the corporation, and in legal contemplation by it (*State v. Laylin*, 73 O. S., 90, 100). We agree with Judge Sater in his conclusions upon the other two questions, and so must affirm the judgment.

B. T. GALLOWAY,  
*Acting Secretary of Agriculture.*

WASHINGTON, D. C., *May 21, 1913.*

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